Supreme Court, U. S.
FILED
JUN 6 1977
MICHAEL RODAK, JR., CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1976

76-1727

JOHNNY JAMES,
Respondent,

vs.

FELIX RODRIGUEZ,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TONEY ANAYA
Attorney General

ANDREA R. BUZZARD
Assistant Attorney General

Bataan Memorial Building
Post Office Drawer 1508
Santa Fe, New Mexico 87501

Counsel for Petitioner

June, 1977

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

TABLE OF CONTENTS

	Page
OPINION BELOW.	1
STATEMENT OF JURISDICTIONAL GROUNDS	2
QUESTION PRESENTED FOR REVIEW.	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT	3
CONCLUSION	6

TABLE OF CITATIONS

Federal Cases

Blackledge v. Perry, 417 U.S. 21 (1974). 3, 4, 5, 6

Chaffin v. Stynchcombe, 412 U.S. 17 (1974) 4

Colten v. Kentucky, 407 U.S. 104 (1972) 4

North Carolina v. Pearce, 395 U.S. 711 (1969) . . . 3, 4, 5, 6

New Mexico Cases

State v. Martinez, ____ N.M. ____, 556 P.2d 578 (Ct. App. 1976). 5

State v. McCraw, 59 N.M. 348, 284 P.2d 670 (1955) 5

State v. Sedillo, 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971) 5

Constitutions:

United States Constitution, 14th Amendment 2

Statutes:

Section 40A-29-6, NMSA, 1953 Comp. 5

Other Authorities: Page

28 U.S.C. Sec. 1254(1). 2

APPENDICES

Memorandum Opinion of the United States District Court for the District of New Mexico A8

Order of the United States District Court for the District of New Mexico A11

Opinion of the United States Court of Appeals for the Tenth Circuit A12

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No._____

JOHNNY JAMES,
Respondent,

vs.

FELIX RODRIGUEZ,
Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

COMES NOW the Petitioner, Felix Rodriguez, by and through his attorneys, Toney Anaya, Attorney General, and Andrea R. Buzzard, Assistant Attorney General, and petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The Respondent, Johnny James, an inmate at the New Mexico State Penitentiary, sought federal habeas corpus relief from a judgment and sentence imposed by the District Court of McKinley County, New Mexico. That action was filed in the United States District Court for the District of New Mexico.

The petition for writ of habeas corpus was dismissed by the Honorable Howard Bratton, District Judge of the United States District Court. Appended hereto is a copy of the order of dismissal and memorandum opinion entered by the United States District Court. Upon appeal, the United States Court of Appeals for the Tenth Circuit reversed the order of dismissal. Appended hereto is a copy of that Court's published opinion.

STATEMENT OF JURISDICTIONAL GROUNDS

On April 12, 1977, the opinion was entered by the United States Court of Appeals for the Tenth Circuit. A petition for rehearing, filed by Respondent, was denied on May 2, 1977. Petitioner seeks review of that Court's decision.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTION PRESENTED FOR REVIEW

Whether the filing of a habitual criminal information for the first time following retrial and conviction violates due process of law.

CONSTITUTIONAL PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitultion.

STATEMENT OF THE CASE

On January 21, 1971, the Respondent, having been found guilty by a jury of one count of burglary and another count of receiving stolen property, was sentenced to a term of not less than one year nor more than five years on both counts, the sentences to run concurrently. Respondent appealed these convictions and the New Mexico Court of Appeals reversed and remanded for a new trial. Upon retrial,Respondent was again convicted of both counts. On February 9, 1975, Respondent

was sentenced to two terms of not less than one year nor more than five years, such terms to run consecutively. Thereafter, the prosecutor filed a habitual criminal information alleging that the Respondent had previously been convicted of four prior felonies. The court determined that Respondent was a habitual offender as alleged and vacated the previous sentences and imposed, in lieu thereof, a sentence of life imprisonment.

After exhausting available state remedies, the Respondent sought habeas corpus relief in the United States District Court for the District of New Mexico raising the claim that the filing of the habitual criminal information following retrial and conviction created the appearance of retaliation against him for having taken an appeal. Respondent urged that his increased sentence was a violation of his constitutional right to Due Process of Law. The District Court denied relief and dismissed the petition. Upon appeal, the United States Court of Appeals for the Tenth Circuit reversed and remanded the cause to the District Court with instructions to vacate the life sentence imposed and further directed that the District Court order the New Mexico District Court for the Eleventh Judicial District to reinstate the two one-to-five-year sentences to run consecutively.

ARGUMENT AMPLIFYING REASONS RELIED ON FOR ALLOWANCE OF WRIT

The Petitioner respectfully submits that the decision rendered by the United States Court of Appeals for the Tenth Circuit conflicts with this Court's decisions in *North Carolina v. Pearce*, 395 U.S. 711 (1969) and its progeny, and with *Blackledge v. Perry*, 417 U.S. 21 (1974). *Pearce* established the rule that, with respect to a sentence imposed by a judge, a sentence more severe than that imposed originally could not be imposed following retrial and conviction absent relevant, identifiable conduct occurring subsequent to the first conviction justifying the more severe sentence. The reason for this holding is that a more severe sentence imposed after reversal and conviction

upon retrial creates the appearance of vindictiveness against a criminal defendant for having successfully appealed. It was thought by the Court that this potential for vindictiveness creates a deterrent effect on the right of a defendant to appeal, which deterrence would violate due process of law. However, this Court held that a harsher sentence imposed upon retrial and conviction by a jury does not create such appearance. *Chaffin v. Stynchcombe*, 412 U.S. 17 (1974). In *Colten v. Kentucky*, 407 U.S. 104 (1972), this Court concluded that the potential for vindictiveness did not inhere in a two-tier system where a trial *de novo* in a different and higher court could be had by a defendant without the assertion of any error. Accordingly, a harsher sentence imposed by the higher court could be constitutionally meted out.

Blackledge v. Perry, supra, follows the rationale of *Pearce* in condemning prosecutorial conduct which creates the appearance of having exacted a penalty for appealing. It is the *Blackledge* holding which the United States Court of Appeals considered as condemning the prosecutorial action in the instant case. *Blackledge* involved a defendant who was originally charged with the misdemeanor of assault with a deadly weapon and was convicted in a North Carolina inferior court. The defendant then asserted his statutory right to a trial *de novo* in a higher court, where he was charged with and convicted of the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. This Court noted that such practice discourages the exercise of the right to appeal because the prosecutor can "up the ante" through a felony indictment should the convicted misdemeanant pursue his statutory appellant remedy. This Court stated:

> A person convicted of an offense is entitled to pursue his statutory right to a trial *de novo* without apprehension that the state will retaliate by substituting a more serious charge for the original one . . .

This Court then held:

> We hold, therefore, that it was not constitutionally permissible for the state to respond to Perry's invocation of his statutory right to appeal by bringing a more serious charge against him prior to the trial *de novo.*

The case at hand is significantly dissimilar from *Blackledge.* The New Mexico habitual criminal statute is a mandatory statute.

Section 40A-29-6, NMSA, 1953 Comp. provides:

> —If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of a crime amounting to a felony in this state, or a crime under the laws of any other state, government or country, which, if committed in this state would be a felony, it shall be the duty of the district attorney of the district in which such subsequent conviction was had, to file an information charging the person as a habitual offender.

That this duty is a mandatory duty has been held by several courts of New Mexico. *State v. McCraw,* 59 N.M. 348, 284 P.2d 670 (1955); *State v. Sedillo,* 82 N.M. 287, 480 P.2d 401 (Ct. App. 1971); *State v. Martinez,* ____N.M.____, 556 P.2d 578 (Ct. App. 1976). Regardless of whether a criminal defendant appeals, he remains subject to the habitual criminal statute. A convicted criminal defendant cannot seriously contend that he fears that the State will "retaliate" against him for exercising his right to appeal by filing a habitual criminal information against him should he succeed in reversing the conviction and obtain a new trial. The taking of an appeal does not provide the *opportunity* for any "retaliation" against him by filing a habitual criminal information. The situation at hand does not present a case of "upping the ante" for taking an appeal.

The filing of a habitual criminal information following retrial and conviction where not filed subsequent to the first conviction simply does not create the appearance of "vindictiveness" against a convicted defendant for having appealed and won a reversal. Unlike the *Pearce* defendant who was not subject to

receiving a harsher sentence absent a reversal and conviction upon retrial, the Respondent in the instant case was subject to receiving a life sentence regardless of whether he appealed. Unlike the *Blackledge* defendant, who was not subject to a felony indictment absent an appeal, the Respondent in the instant case was subject to having a habitual criminal information filed against him regardless of whether he appealed.

This Court has not condemned increased sentences *per se.* It is those sentence increases, the imposition of which, deters a defendant's exercising his right to appeal which this Court has condemned. There is no evidence in the record that the prosecutors in the State of New Mexico file habitual criminal informations only upon convicted defendants who appeal and succeed in reversing their convictions and obtaining a new trial. Yet, the United States Court of Appeals for the Tenth Circuit stated that:

> In our opinion what appears to be a tactical filing of the habitual criminal act constitutes an interference with the right of appeal . . .

Furthermore, we note that, although the United States Court of Appeals characterized the life sentence in this case as "gross," the Court ordered that the consecutive one-to-five-year sentences be imposed even though at the conclusion of the first trial Respondent received concurrent sentences of one to five years. Apparently, the United States Court of Appeals did not think that a sentence increase of five years was so "gross." We submit that this inconsistency also indicates a failure to appreciate the principles enunciated in *Pearce* and its progeny.

CONCLUSION

The present case presents a substantial, judicable federal question and certiorari should issue to the United States

Court of Appeals for the Tenth Circuit in order to resolve this question.

Respectfully submitted,

TONEY ANAYA
Attorney General

ANDREA R. BUZZARD
Assistant Attorney General

Bataan Memorial Building
Post Office Drawer 1508
Santa Fe, New Mexico 87501

Counsel for Petitioner

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW MEXICO

JOHNNY JAMES,
Petitioner,

v.

FELIX RODRIGUEZ, Warden,
NEW MEXICO STATE PENITENTIARY,
Respondent.

No. 75-144 Civil

FILED
United States District Court
Albuquerque, New Mexico
DEC 3, 1975

MEMORANDUM OPINION

Johnny James, an inmate at the New Mexico State Penitentiary, seeks federal habeas corpus relief from a judgment and sentence imposed by the District Court of McKinley County upon his conviction of the crime of burglary, buying, procuring, receiving or concealing stolen property and of being an habitual offender.

The petitioner was sentenced on January 21, 1971 upon his conviction of two felony counts and was sentenced to not less than one nor more than five years on each count; the term to run concurrently.

On appeal, the state appellate court reversed and remanded the case for a new trial. Following conviction at the second trial, the petitioner was sentenced to a term of not less than one nor more than five years on each count, to run consecutively.

Subsequently, the state prosecutor filed an habitual offender petition under NMSA Secs. 40A-29-5 and 40A-29-6. After trial on the habitual offender charge, the petitioner was sentenced to a term of his natural life.

As grounds for relief the petitioner claims:

a) the state prosecutor's act of filing an habitual offender petition only after the reversal of the original conviction created the appearance of retaliation;

b) the state prosecutor invoked NMSA Sec. 40A-29-5(c) prior to invoking the sanctions of NMSA Sec. 40A-29-5(a) or NMSA Sec. 40A-29-5(b);

c) the application of the Habitual Offender Act in this case constitutes cruel and unusual punishment; and

d) the Habitual Offender Act was employed in an arbitrary, uneven and discriminatory manner as to the petitioner.

The petitioner properly presented grounds (a), (b) and (c) to the state court pursuant to Rule 93 and the respondent concedes that the petitioner has exhausted his state remedies as to these grounds. The respondent contends that the petitioner has failed to exhaust his state remedies as to ground (d).

The petitioner, upon direct appeal, contended that application of the Habitual Offender Act amounted to cruel and unusual punishment for the status of being an habitual offender rather than a sentence imposed after commission of some unlawful act. *State v. James*, 85 N.M. 230, 511 P.2d 556 (1973). Here, petitioner asserts the act was applied to him in an uneven arbitrary and discriminatory manner. The state court has not been given the opportunity to first rule on this issue. The direct appeal issue differs from such assertion. *State v. Gillihan*, 86 N.M. 439, 524 P.2d 1335 (1974) does not foreclose relief. The petitioner has failed to exhaust his state remedies as to ground (d).

The petitioner asserts that the appearance was created that the prosecutor acted with a retaliatory motive. No claim is made that he expressly acted with such motive. The prosecutor has no discretion; he is mandated to invoke the provisions of the Habitual Criminal Act. Moreover, it is permissible to delay filing of an information under the Act for a period of approximately one year following the defendant's last conviction.

NMSA Sec. 40A-29-5 imposes no step-by-step application of the Act. The state appellate court's interpretation of its own statutes is binding on this court absent some violation of a fundamental federal constitutional right, not present here.

The application of the Habitual Offender Act in this case does not constitute cruel and unusual punishment. A sentence within the limits set by the state statute does not constitute cruel and unusual punishment.

The files and records conclusively show that the petition is without merit. There is no necessity for an evidentiary hearing nor for ruling upon Petitioner's Motion for Summary Judgment or upon Respondent's Cross-Motion for Summary Judgment.

s/ Howard Bratton
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

JOHNNY JAMES,
Petitioner,
v.
FELIX RODRIGUEZ, Warden,
NEW MEXICO STATE PENITENTIARY,
Respondent.

No. 75-144 Civil

FILED
United States District Court
Albuquerque, New Mexico
DEC. 3, 1975

ORDER

A petition for a writ of habeas corpus having been filed with the court by Johnny James, an inmate of the New Mexico State Penitentiary, and the Court having filed herein its Memorandum Opinion and good cause appearing therefor,

IT IS ORDERED that the petition and this action be, and this action be, and they hereby are, dismissed without prejudice.

s/ Howard Bratton
United States District Judge

APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

No. 76-1047

Filed APRIL 12, 1977
Howard K. Phillips, Clerk
United States Court of
Appeals, Tenth Circuit

JOHNNY JAMES,
Petitioner-Appellant,

v.

FELIX RODRIGUEZ,
Respondent-Appellee.

Appeal from the United States District Court for the District of New Mexico (D.C. No. 75-144-C)

W. Michael Celestre (Robert Ericson, on the brief), for Petitioner-Appellant.

Andrea R. Buzzard, Assistant Attorney General (Toney Anaya, Attorney General, on the brief), for Respondent-Appellee.

Before McWILLIAMS, BREITENSTEIN and DOYLE, Circuit Judges.

DOYLE, Circuit Judge.

The United States District Court for the District of New Mexico denied relief on a petition for writ of habeas corpus filed pursuant to 28 U.S.C. Section 2254. The dismissal was without prejudice, the basis for it being that the prosecutor had no discretion in invoking the Habitual Criminal Act, that application of the Act did not constitute cruel and unusual punishment, and that the defendant had failed to exhaust his state remedies as to his claim that the Act was applied to him in an arbitrary and discriminatory manner. The alleged invalidity of the sentence imposed by the District Court of McKinley

County, New Mexico has given rise to the instant habeas corpus proceeding and the appeal.

Concurrent sentences of not less than one year nor more than five years were originally imposed. On appeal the New Mexico Court of Appeals reversed and remanded for a new trial. There followed a conviction on the original charges at the second trial at which time the appellant was sentenced to two terms of confinement of not less than one year and not more than five years, the sentences to run consecutively.

Only after this imposition of sentence did the district attorney proceed to file a new information alleging that the petitioner was a habitual offender under NMSA Sections 40A-29-5 and 40A-29-6. The court determined that the defendant had been convicted in accordance with this additional charge and proceeded to impose a sentence of life imprisonment. Post conviction relief from the state court was pursued and on appeal the argument of appellant was that the legislative intent required that the Habitual Offender Act be applied one step at a time, that the prosecutor's act had the appearance of retaliation, and that the application of the Habitual Offender Act constitutes cruel and unusual punishment. The New Mexico Court of Appeals rejected these arguments.

As we have noted above, there were two trials and in each instance the sentence was one year to five years, the first sentence was to run concurrently, the second consecutively. It was not until after the reversal of the first conviction and the sentence on the occasion of the second conviction that the district attorney proceeded under the Habitual Offender Act, whereby his sentence to life imprisonment was imposed.

The contention of appellant is that the filing of the habitual criminal charge subsequent to the appellant's retrial and reconviction, thereby bringing about a sentence to life imprisonment, was contrary to North Carolina v. Pearce, 395 U.S. 711 (1969) and Blackledge v. Perry, 417 U.S. 21 (1974). The *Pearce* case is not unlike the case at bar. Pearce was first convicted in a North Carolina court of assault with intent to commit rape. He

was sentenced to a term of 12 to 15 years in prison. Some time later he initiated a post conviction proceeding in state court which resulted in reversal of this conviction by the Supreme Court of North Carolina. This was brought about because of the receipt in evidence of an involuntary confession. He was retried, was again convicted and was sentenced this time to eight years in prison, a sentence which resulted in his serving more time than he would have had he not appealed. It increased his sentence in the net amount of three years. Pearce instituted habeas corpus proceedings in the United States District Court for the Eastern District of North Carolina. That court ruled that the longer sentence was unconstitutional and void. When the state court neglected to resentence Pearce within 60 days, the federal court ordered his release, an order which was affirmed by the United States Court of Appeals for the Fourth Circuit.

In a companion case to *Pearce*, that of *Rice*, an Alabama court sentenced the accused following pleas of guilty to four charges of second degree burglary. The sentence was to prison terms aggregating ten years. Two and one-half years later the judgments were set aside for failure to provide Rice with counsel. He was then retried and convicted and sentenced to prison terms aggregating 25 years, no credit having been given for the time spent in prison under the original judgments. He also brought habeas corpus proceedings in the United States District Court for the Middle District of Alabama, contending that the trial court had acted invalidly in failing to give him credit. The district court agreed with this noting that justification for the harsher sentence was not shown in the record.

The Supreme Court ruled that it was a violation of due process to compel a man to serve the same sentence twice because of having appealed. The Court then went on to say that the cases from the Supreme Court and other courts have uniformly held that if a man appeals and succeeds in getting the judgment reversed that the imposition of a heavier sentence on the second conviction is not per se unconstitutional; that neither the double jeopardy provision of the Fifth-Fourteenth Amendments nor the equal protection clause of the Fourteenth Amendment

creates an absolute bar to a more severe sentence following reconviction. The evil arises, according to the opinion of Mr. Justice Stewart, where the more severe sentence is related to the fact that the defendant appealed; the imposition of a punishment for exercising a constitutional right is "patently unconstitutional."

The objection to the heavy sentence is that it interferes with the free exercise of the right of appeal. Thus it is potentially a misuse of power where it is done vindictively. To avoid this it was held that the reasons for the more severe sentence must be set forth and must include objective information.

In the *Rice* case there was no attempt to justify the increased punishment. In the *Pearce* case also it did not appear that there was any justification apart from the naked power to impose it. On that basis the holding was that the sentences were invalid. In the instant case, there was also no attempt to justify the increased punishment.

Blackledge v. Perry, supra, was not dissimilar. A North Carolina inmate had an altercation with another prisoner, and was charged with and convicted of assault with a deadly weapon in state district court. He appealed to the higher court where he would have been entitled to a trial *de novo,* but upon the exercise of this right of appeal the district attorney filed a more serious charge, the felony of assault with a deadly weapon with intent to kill and inflict serious bodily injury. Defendant entered a plea of guilty to that charge. Thereafter, he applied for a writ of habeas corpus in federal court claiming that the new charge deprived him of due process. The district court granted the writ and the court of appeals affirmed. The Supreme Court agreed with the contention that the filing of the felony charge constituted a violation of due process since the defendant had a right to pursue his *de novo* appeal without fear of a more serious charge being filed against him.

In the *Perry* case there was an additional problem not present at bar growing out of the fact that Perry had entered a plea of *guilty* to the felony count. The Supreme Court's answer to this

was that it was invalid to file a felony charge and, therefore, his plea of guilty was incapable of validating that proceeding. The essence of the Court's holding was that the refiling was vindictive, there having been nothing in the record to disprove this, and where there is a realistic likelihood of vindictiveness the due process clause is violated.

The district attorney, it is pointed out, has a stake in discouraging appeals and he has the ability at hand to prevent them. Neither bad faith nor motive is necessary. Rather, the emphasis is on the right of the person convicted to pursue his right to trial *de novo* or appeal without fear that he will suffer a more serious charge. On that ground it was held to be a violation of the Constitution for the state to respond to the appeal of Perry by filing a more serious charge against him.

Judging the case at bar by the standards set forth in *Pearce* and *Perry*, we must conclude that in the absence of evidence to the contrary, the filing of the habitual criminal charge was not unrelated to his having appealed. The fact that there was a gross increase in the sentence supports this conclusion. Thus one who appeals a one to five year sentence ought not to have to anticipate that he will end up being sent to prison for life.

It is argued by the government that the district attorney was not exercising discretion because the habitual criminal statute, Section 40A-29-6 NMSA (1953 Comp.), provides that where the defendant has a criminal record the filing of the habitual criminal statute is mandatory. It is true that the statute contains mandatory language.[1] The courts of New Mexico have construed the statute as being mandatory. *See* State v. Gonzales, 502 P.2d 300, 82 N.M. 287 (1972); State v. Sedillo, 480 P.2d 401, 82 N.M. 287 (App. 1971); and State v. McGraw, 284 P.2d

1. NMSA Section 40A-29-6 provides that

> If at any time, either after sentence or conviction, it shall appear that a person convicted of a felony has previously been convicted of a crime amounting to a felony in this state. . . . it shall be the duty of the district attorney of the district in which such subsequent conviction was had, to file an information charging the person as a habitual offender.

670, 59 N.M. 348 (1955). *But see* State v. Baldona, 441 P.2d 215, 79 N.M. 175 (App. 1968).

In *State v. Gonzales, supra,* for example, defendant was convicted in November 1971 and was sentenced to two to ten years. On December 22, 1971, the district attorney filed a habitual criminal information based on an earlier conviction plus the November 1971 conviction. The result of this was that an amended sentenced of five to twenty years was imposed.

In *State v. Baldona, supra,* the New Mexico Court of Appeals upheld an individual's conviction under the Habitual Criminal Act and overruled his contention that his rights under the equal protection clause of the Fourteenth Amendment were violated because of the uneven application of the habitual criminal statute. In its opinion the New Mexico Court of Appeals recognized that district attorneys do not file an information under the Habitual Criminal Act in each instance in which it is possible to do so. The court recognized that reason for failing to prosecute defendant subject to the Act, such as inability to prove the prior conviction or procedures necessary to obtain the presence of witnesses from out of state, was not available. The court went on to say that selective application of the Act will be a ground for relief only when it is shown to be intentional or personal discrimination or arbitrary action amounting to an unjust and illegal discrimination between persons in similar circumstances. From a reading of this opinion it is apparent that the Act is not always used.

In *State v. McGraw, supra,* it was held that where an information which charged the defendant with being a habitual criminal was filed a month after his last conviction, there was good and sufficient reason for the delay.

In the case at bar no effort has been made by the State of New Mexico to furnish an explanation as required by the Supreme Court's opinions in *North Carolina v. Pearce, supra,* and *Blackledge v. Perry, supra.* The State simply points to the mandatory terms of the statute. We, however, do not consider this a sufficient answer to the charge that the habitual criminal

statute was employed in a manipulative way. On the other hand, we find it significant that the habitual criminal charge was not brought in until after the appeal and reversal of the first conviction.

Another reason why the mandatory nature of the Habitual Criminal Act is not a conclusive answer to the unexplained filing of the habitual criminal charge after appeal and reversal is that the district attorney, and he alone, is empowered to file informations. He also has authority to not file informations. The fact that a state court might be able to force him to file under the Habitual Criminal Act where such a charge would lie does not mean that he does not or cannot file a charge or withhold the charge as he sees fit. In the case at bar he chose to withhold the filing of it at the time of the first conviction, and it was only after the appeal, reversal and trial resulting in conviction on the charge in the second proceeding that he came forward with the habitual criminal charge. In our opinion what appears to be a tactical filing of the Habitual Criminal Act constitutes an interference with the right of appeal and it is thus a violation of the due process clause of the Fourteenth Amendment.

Accordingly, we conclude that the judgment of the district court must be reversed. The cause is remanded to the district court with instructions to grant the relief requested, which is the vacating of the aggravating life imprisonment sentence. The district court is further directed to order the State District Court for the New Mexico Eleventh Judicial District to reinstate the two one to five year sentences to run consecutively. Upon resentencing of the defendant the sentencing court should be directed to credit the defendant with time which he has served on this particular charge. It is so ordered.

No. 76-1047, JAMES v. RODRIGUEZ

McWILLIAMS, Circuit Judge, dissenting:

I respectfully dissent and would affirm the judgment of the district court on the basis of the reasons given in its memorandum opinion.

The New Mexico habitual criminal statute is mandatory in its terms. N.M. Stat. Ann. Sec. 40 A-29-6. The fact that a district attorney has not proceeded against all who come within the reach of an habitual criminal statute does not deny equal protection to persons who are prosecuted thereunder. Oyler v. Boles, 368 U.S. 448 (1962). There is no requirement under the New Mexico habitual criminal statute that the charge of being an habitual offender must be filed when the information charging the current offense is filed. On the contrary, the statute provides that "*if at any time*, either *after sentence* or *conviction*, it shall appear that a person convicted of a felony has previously been convicted of a crime . . . it shall be the duty . . . ." (Emphasis added.) N.M. Stat. Ann. Sec. 40 A-29-6. Under the statute, then, it would appear that the district attorney may wait until there has been a final conviction on the current charge before filing an information charging the defendant as an habitual offender. In State v. McGraw, 284 P.2d 670 (N.M. 1955), an amended information, charging the defendant as an habitual offender under a predecessor statute, was filed one year after the conviction on the current offense. I do not believe that the practice in New Mexico of waiting to file habitual criminal charges until the conviction on the current charge has become final comes within the prohibitions of Blackledge v. Perry, 417 U.S. 21 (1974) or North Carolina v. Pearce, 395 U.S. 711 (1969).

In his amended petition filed in the district court, the petitioner in the instant case did *not* charge the district attorney in instituting habitual criminal charges against him with acting in a vindictive or retaliatory manner. All that was alleged was that the sequence of events indicated an "appearance" of retaliatory action. If there had been a charge that the district attorney had actually acted in a retaliatory and vindictive manner, then an evidentiary hearing might well be in order, but I do not deem such to be the instant case.

Supreme Court, U. S.
FILED
JUN 20 1977
MICHAEL RODAK, JR., CLERK

No. 76-1727

IN THE

Supreme Court of the United States

October Term, 1976

CLYDE J. MALLEY, Warden,
Petitioner,

v.

JOHNNY JAMES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

ALAN R. TARADASH
W. MICHAEL CELESTRE
Post Office Box 306
Window Rock, Arizona 86515
Telephone: 602/871-4151

DONALD B. MILLER
1712 N. Street, N.W.
Washington, D.C. 20036
Telephone: 202/785-4166

Counsel for Respondent

July, 1977

VERGARA PRINTING CO. · SANTA FE, NEW MEXICO

TABLE OF CONTENTS

OPINIONS BELOW 1

QUESTIONS PRESENTED 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 3

CONCLUSION 5

APPENDIX A1

TABLE OF CITATIONS

Table of Cases:

Blackledge v. Perry, 417 U.S. 21 (1974) 3, 5

North Carolina v. Pearce, 395 U.S. 711 (1969) 3, 5

State v. Baldonado, 79 N.M. 175, 441 P.2d 215 (App. 1969) 4

State v. James, 83 N.M. 263, 490 P.2d 1236 (App. 1971) 2

State v. Leck, D.C. Eddy County, New Mexico, No. 6501 (Sept. 25, 1975) *rev'd on other grounds, State v. Leck*, Court of App's No. 2289 (Nov. 18, 1975) 4

Taylor v. U.S., 475 F.2d 1121 (6th Cir. 1973) 5

Thurman v. U.S., 423 F.2d 988 (9th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970) 5

U.S. v. Anderson, 514 F.2d 583 (7th Cir. 1975) 5

U.S. v. Clutterbuck, 445 F.2d 839 (9th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971) 5

Table of Cases (cont'd):

U.S. v. Jamison, 505 F.2d 407 (D.C. Cir. 1974) 5

U.S. v. Johnson, 537 F.2d 1170 (4th Cir. 1976) 5

U.S. v. Ruesga-Martinez, 534 F.2d 1367 (9th Cir. 1976)..... 5

U.S. v. Williams, 534 F.2d 119 (8th Cir. 1976), *cert. denied*, -U.S.-, 50 L.Ed.2d 177 (1976)..... 5

U.S. Const.:

U.S. Const. amend XIV 2

Statutes:

Section 40A-29-5, N.M.S.A. (1953 Comp.) 2, 4

Section 40A-29-6, N.M.S.A. (1953 Comp.) 2

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1976

No. 76-1727

CLYDE J. MALLEY, Warden,
Petitioner,

v.

JOHNNY JAMES,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

Respondent Johnny James respectfully submits this brief in opposition to certiorari. This brief addresses the petition for certiorari filed in this Court on June 6, 1977.

OPINIONS BELOW

The Court of Appeals' opinion is reported at 553 F.2d 59 (10th Cir. 1977). The District Court's opinion was not reported.

QUESTIONS PRESENTED

1. Did the filing of a habitual offender petition against respondent, only after his successful appeal and retrial, violate his right to due process of law as guaranteed by U.S. Const. amend. XIV?

2. Can a defendant's sentence, which was originally two one to five year concurrent terms, be modified after retrial to two consecutive one to five year terms when the reason for the modification does not appear on the record?

STATEMENT OF THE CASE

On January 21, 1971, the District Court for the Eleventh Judicial District, State of New Mexico, sentenced respondent to two one to five year terms following his conviction of one count of burglary and one count of receiving stolen property contained in cause 3539. These sentences were to run concurrently.

Respondent appealed these convictions to the New Mexico Court of Appeals. That court reversed both convictions and remanded the case for a new trial. *State v. James*, 83 N.M. 263, 490 P.2d 1236 (App. 1971).

Respondent was again convicted on each of the two counts in cause 3539 after his second trial. Thereafter, he was resentenced to a one to five year term on each count. The trial court, however, ordered these terms run consecutively.

After respondent's second conviction and sentencing, the district attorney filed a criminal information alleging that respondent was a habitual offender under the provisions of Sections 40A-29-5 and 40A-29-6, N.M.S.A. (1953 Comp.). The information alleged that respondent had been convicted in the District Court for the Eleventh Judicial District of grand larceny on October 16, 1961; breaking and entering on January 22, 1962; burglary on November 12, 1963; larceny on March 15, 1965; burglary on February 6, 1968; and burglary and receiving

stolen goods on February 9, 1972. R. Vol. I, pp. 31-3. Although the same district attorney prosecuted respondent in each of his previous trials and in his first trial on cause 3539, this was the first time the district attorney filed a habitual offender petition against respondent. R. Vol. I, p. 26. The State of New Mexico made no effort to explain its reasons for increasing respondent's sentence only after retrial. 553 F.2d at 62.

The District Court entered its third Judgment and Sentence in cause 3539 on March 6, 1972, following respondent's conviction on the habitual offender petition. This order sentenced respondent to life imprisonment.

REASONS FOR DENYING THE WRIT

This Court in *North Carolina v. Pearce*, 395 U.S. 711 (1969), held that the due process clause protects a defendant from both actual vindictiveness and the fear of retaliation for exercising his right to appeal. To implement this protection this Court required that whenever the same judge imposes a more severe sentence after retrial his reasons for doing so must affirmatively appear upon the record. This principle was extended to prosecutorial conduct in *Blackledge v. Perry*, 417 U.S. 21 (1974).

In the instant case, as in *Pearce* and *Blackledge*, respondent's sentence was increased after his appeal and retrial. The court below, in applying the standards set forth in those cases, "conclude[d] that in the absence of evidence to the contrary, the filing of the habitual criminal charge was not unrelated to his having appealed." 553 F.2d at 61. As a result, that court vacated respondent's life sentence.

Petitioner contends that this Court should grant certiorari to review the decision below since that decision purportedly conflicts with this Court's decisions in *Pearce* and *Blackledge*. The main thrust of petitioner's brief, however, is that procedural requirements set forth in *Pearce* and *Blackledge* are inapplicable to the instant case, since the prosecutor has a "mandatory"

duty to invoke the sanctions of the Habitual Offender Act. See Section 40A-29-5 N.M.S.A. (1953 Comp.).

The mere characterization of the prosecutor's duty as "mandatory" does not prevent New Mexico's prosecutors from utilizing the Act's sanctions to retaliate against a defendant for exercising his right to appeal.

The court below, after examining *State v. Baldonado*, 79 N.M. 175, 441 P.2d 215 (App. 1969), found that the State's district attorneys do not always file an information under the Habitual Offender Act in each instance in which it is possible to do so. 553 F.2d at 62. Judge Mack Easley, now a Justice of the New Mexico Supreme Court, also found that the state's district attorneys,

> have no set procedure for filing habitual offender charges, but in the discretion of the office, they file in an irregular fashion with resultant procedures being discriminatory, selective, arbitrary and uneven.
>
> 8. Also . . . as a part of the normal and customary practice of the District Attorney's office, Fifth Judicial District, State of New Mexico and other districts as well, filing of habitual criminal charges or the possibility of such filing is used as a part of plea bargaining procedures. *State v. Leck*, D.C. Eddy County No. 6501 (Sept. 25, 1975), *rev'd on other grounds, State v. Leck*, Court of App's No. 2289 (Nov. 18, 1975).

Appendix p. A2

The district attorney for New Mexico's Eleventh Judicial District chose to disregard this "mandatory" duty and failed to invoke the sanctions of the Habitual Offender Act against respondent on five occasions (including his first trial on cause 3539). It was only after respondent appealed, was retried and reconvicted that the prosecutor chose to comply with the "requirements" of the Habitual Offender Act. The court below found that this unexplained, selective application of the Act "constitutes an interference with [respondent's] right of appeal

and is thus a violation of the due process clause of the Fourteenth Amendment." 553 F.2d at 62.

The decision of the court below is consistent with the decisions of the other Circuit Courts which have resolved the question. *U.S. v. Johnson*, 537 F.2d 1170 (4th Cir. 1970); *U.S. v. Ruesga-Martinez*, 534 F.2d 1367 (9th Cir. 1976); *U.S. v. Anderson*, 514 F.2d 583 (7th Cir. 1975); *U.S. v. Jamison*, 505 F.2d 407 (D.C. Cir. 1974). These courts found the prosecutor's failure to explain his reasons for the delay until after retrial in seeking the increased sentence violated the defendent's right to due process.

The court below did not order the reinstatement of respondent's original sentence, two one to five concurrent terms. Instead, that court directed the reinstatement of the consecutive sentences respondent received after retrial. Petitioner contends that this order "indicates a failure [by the court below] to appreciate the principles enunciated in *Pearce* and its progeny." Petitioner's Brief for Certiorari at 6.

The rule announced in *Pearce* only prevents a court from increasing, without explanation, the length of a defendant's sentence at retrial. The rule does not prevent the court from converting two concurrent sentences into consecutive sentences so long as the total time to be served does not exceed the term of the original sentence. *Taylor v. U.S.*, 475 F.2d 1121 (6th Cir. 1973); *U.S. v. Clutterbuck*, 445 F.2d 839 (9th Cir. 1971), *cert. denied*, 404 U.S. 858 (1971); *Thurman v. U.S.*, 423 F.2d 988 (9th Cir. 1970), *cert. denied*, 400 U.S. 911 (1970). See also *U.S. v. Williams*, 534 F.2d 119 (8th Cir. 1976), *cert. denied*, –U.S.–, 50 L.Ed.2d 177 (1976).

CONCLUSION

The decision of the court below in invalidating the increase in respondent's sentence is consistent with this Court's decisions in *Pearce* and *Blackledge*. That court found that the prosecutor's

unexplained delay in seeking the imposition of the increased sentence constituted a denial of respondent's right to due process of law guaranteed by the Fourteenth Amendment. For this reason, review by this Court should be denied.

Dated July, 1977.

Respectfully submitted,

ALAN R. TARADASH
W. MICHAEL CELESTRE
Post Office Box 306
Window Rock, Arizona 86515
Telephone: 602/871-4151

DONALD B. MILLER
1712 N. Street, N.W.
Washington, D.C. 20036
Telephone: 202/785-4166

Counsel for Respondent

APPENDIX

IN THE DISTRICT COURT OF EDDY COUNTY
STATE OF NEW MEXICO

STATE OF NEW MEXICO, Plaintiff,	)	
vs.	)	No. 6501
JAY B. LECK, Defendant.	)	

DECISION OF THE COURT

The Court adopts the following

Findings of Fact

1. On November 25, 1974, following jury trial on October 9, 1974, at which a verdict of guilty with recommendation of clemency was returned, Jay B. Leck was sentenced to not less than one nor more than five years in Cause No. 6410, Eddy County.

2. On November 23, 1974, Jay B. Leck, while a passenger in a work car owned by Warton Drilling Company and used by its employees as a crew car, discharged a .44 Magnum Ruger Blackhawk and, as a result, took the life of Donald Lee Eggleston.

3. On December 9, 1974, by criminal information filed in Cause No. 6501, Eddy County, Jay B. Leck was charged with murder in the first degree contrary to Sec. 40A-2-1, N.M.S.A., 1953 Comp.

4. Following plea bargain procedures Jay B. Leck was allowed to plead guilty to involuntary manslaughter contrary to Sec. 40A-2-3 and Sec. 40A-2-3B; this was accepted by this

Court on March 31, 1975, and sentence of not less than one nor more than five years, consecutive to that same period assessed as the sentence in Cause No. 6410, was given on May 20, 1975.

5. On May 15, 1975, by supplemental information filed in Cause No. 6501, Jay B. Leck was charged as being a habitual offender and on May 20, 1975, at the arraignment defendant remained mute, allowing the Court to enter a plea of not guilty to that charge.

6. On July 9, 1975, at the hearing on the habitual offender charge, Jay B. Leck waived his right to a trial by jury on the issue of identity in Cause Nos. 6410 and 6501 and stipulated he was the same person charged in both those matters. This waiver and admission were accepted by the Court, no objection being made.

7. At that hearing on July 9, 1975, by testimony of David L. Hoglund, Assistant District Attorney, Fifth Judicial District, State of New Mexico, it was developed that this District Attorney's office, and other Districts as well, have no set procedure for filing habitual offender charges, but in the discretion of the office, they file in an irregular fashion with resultant procedures being discriminatory, selective, arbitrary and uneven.

8. Also by testimony of David L. Hoglund it was developed that as a part of the normal and customary practice of the District Attorney's office, Fifth Judicial District, State of New Mexico and other Districts as well, filing of habitual criminal charges or the possibility of such filing is used as a part of plea bargaining procedures.

9. By Mr. Hoglund's testimony it was further developed that in other capital cases filed by his office involving the same capital charge as initially filed against Jay B. Leck in Cause No. 6501, defendants were allowed to plead to reduced charges following plea bargaining proceedings, and as part of the plea and disposition agreements in those other cases it was agreed the District Attorney would not file habitual offender charges.

The Court adopts the following

Conclusions of Law

1. Defendent Jay B. Leck has standing in Cause No. 6501 to challenge the Habitual Criminal Act of the State of New Mexico, Sec. 40A-29-5 et seq., N.M.S.A., 1953 Comp., as being unconstitutional on its face and as applied in this cause.

2. The New Mexico Habitual Criminal Act, Sec. 40A-29-5 et seq., N.M.S.A., 1953 Comp., is unconstitutional on its face as being contrary to the cruel and unusual punishments clauses of U. S. CONST., Amendment VIII, and N. M. CONST., Art. II, Sec. 13.

3. The New Mexico Habitual Criminal Act is unconstitutional on its face as being contrary to the equal protection clauses of U. S. CONST., Amendment XIV, Sec. 1, and N. M. CONST., Art. II, Sec. 18.

4. The New Mexico Habitual Criminal Act as applied in Cause No. 6501 is unconstitutional as being contrary to the cruel and unusual punishments clauses of U. S. CONST., Amendment VIII, and N. M. CONST., Art. II, Sec. 13, and the equal protection clauses of U. S. CONST., Amendment XIV, Sec. 1, and N. M. CONST., Art. II, Sec. 18.

All Requested Findings of Fact and Conclusions of Law submitted by the parties hereto at variance herewith and not adopted herein are hereby refused.

s/ MACK EASLEY

DISTRICT JUDGE